

**Town of Georgetown -- Appeal
Department Order #13-09, Mandatory Shoreland Zoning Act**

- **Draft Proposed Board Order**



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
STATE HOUSE STATION 17 AUGUSTA, MAINE 04333

BOARD ORDER

TOWN OF GEORGETOWN) MANDATORY SHORELAND ZONING ACT
SAGadahoc COUNTY)
SHORELAND ZONING ORDINANCE) FINDINGS OF FACT AND ORDER
DEPARTMENT ORDER #13-09) ON APPEAL

Pursuant to the provisions of 38 M.R.S. §341-D(4) and 438-A and 06-0976 CMR Chapter 2 (Rules Concerning the Processing of Applications and Other Administrative Matters) and Chapter 1000 *State of Maine Guidelines for Municipal Shoreland Zoning Ordinances*, the Board of Environmental Protection has considered the appeal by the Town of Georgetown of the Department's April 28, 2009 Conditional Approval and Partial Denial of the Town's Shoreland Zoning Ordinance (Order #13-09). Based on review of materials submitted by the appellant, and other related materials on file, the Board makes the following findings:

PROCEDURAL HISTORY

1. On March 16, 2009, the Town of Georgetown submitted a copy of its amended Shoreland Zoning Ordinance (Ordinance), as adopted by on March 11, 2009, to the Department for review. The Ordinance included numerous changes intended to make it consistent with the May 1, 2006 *State of Maine Guidelines for Municipal Shoreland Zoning Ordinances*, 06-096 CMR Chapter 1000 (Guidelines) as required by 38 M.R.S. §438-A, subsection 2. The Department's review of the Ordinance revealed several deficiencies.
2. In a letter dated April 7, 2009, the Town of Georgetown was notified by the Department of the deficiencies as required by 38 M.R.S. §438-A, subsection 3.
3. On April 28, 2009 the Department issued Conditional Approval and Partial Denial of the Town's Ordinance with two conditions: one requiring that the term "developed area" be deleted from the definitions section, the other denying an amendment to remove 14 lots from the Resource Protection District.
4. On June 3, 2009, the Town of Georgetown submitted a timely appeal of the Department's decision.
5. By letter dated June 26, 2009, the Town of Georgetown requested that the Board remand the matter to the Department.

TOWN OF GEORGETOWN) MANDATORY SHORELAND ZONING ACT
SHORELAND ZONING ORDINANCE) FINDINGS OF FACT AND ORDER
DEPARTMENT ORDER #13-09) ON APPEAL

6. On September 16, 2009, the Town of Georgetown submitted additional data to the Department to supplement their request that the Board remand the matter to the Department. The supplemental information relates only to the fourteen lots identified in condition #2 of Department Order #13-09.
7. By letter dated October 8, 2009, the Board Chair admitted into the record the exhibits attached to the Town's appeal, and the supplemental evidence submitted by the Town on September 16, 2009.

STANDING

8. The Town of Georgetown, as the applicant, is an aggrieved person as defined in Chapter 2 of the Department's rules and has standing to bring the appeal.

APPEAL

9. In its appeal, the Town of Georgetown objects to the conditional approval and partial denial of its Ordinance, including Condition #1 and Condition #2 set forth in the Department's decision.
10. The appellant objects to Condition #1 on the basis that the Department previously allowed the definition and that the definition is consistent with the Guidelines.
11. The appellant objects to Condition #2 on the premise that the Town of Georgetown intended to zone the fourteen subject parcels with a Limited Residential/ Recreational District rather than a Resource Protection District in 1993, in order to be consistent with the term "developed areas" as defined in the Ordinance and also at issue in this appeal.

REMEDY REQUESTED

12. The appellant requests that the Board overturn the Department's decision and vacate Condition #1 and Condition #2 in Department Order #13-09.

TOWN OF GEORGETOWN) MANDATORY SHORELAND ZONING ACT
SHORELAND ZONING ORDINANCE) FINDINGS OF FACT AND ORDER
DEPARTMENT ORDER #13-09) ON APPEAL

RESPONSE TO APPEAL

13. The appellant contends that the defined Ordinance term “developed area”, is conceptually consistent with the Guidelines. When applied as intended, the definition allows for undeveloped areas of land to be exempt from Resource Protection District zoning if a parcel of land is part of a municipal subdivision prior to November 18, 1993, and also if the owner of a parcel of land had obtained approval for a subsurface wastewater disposal design prior to this same date. The Department’s finding disagrees with this contention that the definition is consistent with the Guidelines. While the Guidelines do not explicitly define the term “developed area”, the Department utilizes a long-standing policy for determining whether affected areas of shoreline are currently developed for the purposes of determining whether areas of shoreline should be zoned as a Resource Protection District. Section 13(A) of the Guidelines allows areas which are currently developed to be excluded from a Resource Protection District, but nothing in the Guidelines allows a municipality to consider speculative or future development to be a factor for excluding an area from a Resource Protection District. The definition and its application are inconsistent and less restrictive than the requirements of the Guidelines and therefore the Board finds that Condition #1 of Department Order #13-09 is reasonable and in accordance with 38 M.R.S. §438-A(2).
14. The appellant also argues that the Department erred by including Condition #2 in Department Order #13-09, requiring the regulation of certain areas of shoreline affecting fourteen parcels with a Resource Protection District. In *Moger v. Georgetown* (Superior Court, Sagadahoc County, Docket No. AP-06-08, August 6, 2007), the Court concluded that the Ordinance definition for “developed areas” caused specific exclusion of a certain parcel of land from a Resource Protection District despite the Town zoning map clearly regulating this parcel with a Resource Protection District. If the Court’s decision is similarly applied to the fourteen subject lots identified in Condition #2 of Department Order #13-09, it could also remove the Resource Protection District designation from these parcels. 38 M.R.S. §438-A, Subsection 1-B(B) requires the State to provide notification to landowners whose property is being considered by the Board for placement in a Resource Protection District. Such notification is not required if property is currently zoned with such a district. Notwithstanding the depiction of a Resource Protection District on the Town zoning map, the Court’s decision in *Moger v. Georgetown* may be interpreted to have removed the Resource Protection District zoning from the fourteen lots and therefore notification to affected property owners is arguably required.

TOWN OF GEORGETOWN) MANDATORY SHORELAND ZONING ACT
SHORELAND ZONING ORDINANCE) FINDINGS OF FACT AND ORDER
DEPARTMENT ORDER #13-09) ON APPEAL

Since the owners of the fourteen lots whose zoning would be impacted by the Department's decision requiring the Resource Protection District to remain did not receive notice of the potential zoning change, the Board finds that Condition #2 of Department Order #13-09 should be vacated. The Board makes no findings on the appropriate zoning district for these lots at this time.

Based upon the above FINDINGS OF FACT, the Board makes the following CONCLUSIONS:

1. The Town of Georgetown is an aggrieved person and may bring this appeal.
2. The Mandatory Shoreland Zoning Act requires that all municipal Shoreland Zoning Ordinances be consistent with the Chapter 1000, *State of Maine Guidelines for Municipal Shoreland Zoning Ordinances*, as adopted by the Board.
3. The Board finds that the definition of "developed areas" is inconsistent with the Guidelines and therefore the Board denies the appeal of Condition #1 of Department Order #13-09.
4. The owners of fourteen lots affected by Condition #2 of Department Order #13-09 did not receive notice of a potential change in the zoning of their lots to a Resource Protection District; therefore, Condition #2 of the Order should be vacated for procedural reasons to provide for proper notification to affected landowners.

THEREFORE, the Board AFFIRMS Condition #1 of Department Order #13-09 deleting the term "Developed Area" from Section 17, Definitions of the Town of Georgetown Shoreland Zoning Ordinance, and VACATES Condition #2 of Department Order #13-09.

DONE AND DATED AT AUGUSTA, MAINE THIS ____ DAY OF NOVEMBER, 2009.

BOARD OF ENVIRONMENTAL PROTECTION

BY: _____
Susan M. Lessard, Chair